Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1993

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FRANCIS SOMENSKI and JOHN WALSH,
*Petitioners*,

vs.

COMPANHIA DE NAVEGACIO
LLOYD BRASILEIRO,
*Respondent.*

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX TO PETITION

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29pp

## QUESTION PRESENTED

1. Does not the shipowner's duty of care owed to a longshoreman under Section 5(b) of the Longshore and Harbor Workers' Compensation Act extend to unsafe conditions existing in a cargo stow arising from the manner in which cargo was stowed aboard the vessel, where the shipowner knows or has reason to know of the unsafe condition, and could have prevented it from occurring?

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No. 93-

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In The
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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Francis Somenski and John Walsh, respectfully pray that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered October 14, 1993, affirming the

Judgment of the United States District Court for the Eastern District of Pennsylvania in favor of respondent in the within proceeding, and, in support thereof, represent as follows.

## OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit, affirming the Judgment of the United States District Court for the Eastern District of Pennsylvania, is not officially reported, and is reproduced in the Appendix hereto at page 8a.

The Opinion and Order of the United States District Court for the Eastern District of Pennsylvania granting judgment in favor of respondent and against petitioners is not officially reported, and is reproduced in the Appendix hereto at page 1a.

## JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on October 14, 1993. By Order signed by Associate Justice David H. Souter on December 30, 1993, the time for filing a Petition for a Writ of Certiorari in this matter was extended to and including March 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Section 5(b) of the Longshore and Harbor Workers' Compensation Act, as amended in 1972, Pub. L. 92-576, 86 Stat. 1251, and further amended in 1984, Pub. L. 98-426, 98 Stat. 1641, 28 U.S.C. § 905(b).

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

## LEGISLATIVE HISTORY INVOLVED

The legislative history accompanying the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report No. 72-1441, and is reprinted in 1972 U.S. Code Cong. & Adm. News, Vol. 3, beginning at page 4698. The portion relating to Section 5(b) of the Act, titled "Elimination of Unseaworthiness Remedy," begins at page 4701.

## STATEMENT OF THE CASE

This case was decided in the District Court in a nonjury trial limited to the issue of liability. In the District Court there was evidence to establish the following facts which are relevant to this petition.

Petitioners, Francis Somenski and John Walsh, were injured on June 23, 1987, while working as longshoremen and engaged in unloading a cargo of steel pipe from the No. 5 lower hold of the M/V LLOYD TUPIARA, a cargo vessel owned and operated by respondent. The pipe which petitioners were unloading had been loaded by a stevedore in Rio de Janeiro, Brazil (2a).

The pipe had been packaged in bundles of eight to ten pipes each, with the bundles being of varying lengths. Pursuant to a stowage plan which had been prepared by the ship's officers, the stevedore in Brazil had stowed the pipe in two piles in the lower hold to a height which came to within five or six feet of the underside of the top of the lower hold (2a).

It was petitioners' contention that the manner in which the pipe was stowed in the hold was such that it could not be discharged with reasonable safety because (1) the two piles of pipe overlapped in the center of the hold, (2) the pipe was stowed to too great a height under the overhang of the hold, and (3) that there was insufficient chocking between the bundles of pipe (2a, 5a). Because of these conditions, it further was petitioners' contention that, in order to discharge the pipe, the discharging longshoremen had to drag the bundles of pipe out from underneath the overhang of the hold, an unreasonably dangerous operation which ultimately was the cause of petitioners being injured.

There was evidence to establish that, at the time petitioners were injured, they were standing on top of the pipe in the No. 5 lower hold and engaged in discharging two bundles of pipe. In order to discharge these two bundles of pipe, steel cables had been fastened around each end of the bundles and, as the pipe was being lifted out of the hold, an operation which resulted in one end of the pipe being dragged on top of the pipe beneath it, the end of the pipe being dragged became caught on the pipe beneath it, causing the pipe being dragged to spin around and strike petitioner, Walsh. As a result of being struck by the pipe, Walsh was thrown into petitioner, Somenski, causing Somenski to be knocked off the stow of cargo, a distance of approximately 17 feet to the bottom of the hold. Petitioner, Walsh, suffered injury as a result of being struck by the pipe, and petitioner, Somenski, suffered injury as a result of being thrown off the stow (2a-3a).

The District Court's decision in the case was controlled by the Third Circuit's decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 496 U.S. 1007 (1988). In *Derr,* the Third Circuit had held that a shipowner was not responsible for dangerous conditions resulting from the unsafe manner in which cargo had been loaded aboard a ship by a loading stevedore. Because of the *Derr* holding, in the District Court petitioners sought to establish the vessel's liability on the theory that the vessel was "actively involved" in the negligent stowage of the cargo because of the role the shipowner had played in designing the stowage plan pursuant to which the pipe was stowed on the ship by the loading stevedore in Brazil.[1] As to this specific contention, the District Court held that the actions of the

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[1]The "active involvement" theory of vessel liability was recognized in this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167 (1981).

ship's officers in formulating the stowage plan was insufficient as a matter of law to constitute the type of "active involvement" which would warrant holding the vessel liable for the unsafe manner in which cargo may have been stowed (4a). That specific holding is not being challenged by the instant petition. Rather, at issue in this petition is the ruling of the Third Circuit in *Derr v. Kawasaki Kisen K.K., supra*, that a vessel is not responsible for the manner in which cargo was stowed by a loading stevedore, a ruling which ultimately was the basis on which the District Court found in favor of the respondent shipowner (6a). With reference to this issue, there was evidence in the to establish the following facts.

The Captain of the ship testified that he was present on the ship during the time that cargo was loaded in Brazil. He personally went around the ship and observed the manner in which the cargo was being loaded (11a). He further testified that he observed the condition of the stow at the conclusion of the loading operation in Brazil, and again saw the condition of the stow in the No. 5 lower hold at the time the No. 5 lower hold was opened in the unloading port. He further testified that the condition of the stow on arrival in the unloading port was the same as it had been at the completion of the loading operation in Brazil. Thus, there was evidence to establish knowledge on the part of the ship's Captain of the manner in which the pipe was stowed, *before, during* and *after* completion of the loading operation, as well as at the start of the unloading operation (11a-12a).

There also was evidence to establish that the *manner* of stowage was such that the pipe could not be discharged with reasonable safety. In this regard, an expert on cargo stowage, called as a witness on behalf of petitioners, testified that the selection of the No. 5 hold for stowing the steel, coupled with the height to which the steel was stowed, created a condition

where the cargo could not be discharged safely (12a-14a). Notwithstanding this testimony, the Trial Judge found that the conditions which rendered the stow unsafe -- insufficient chocking and overlapping of the piles of steel -- were attributable to the manner in which the cargo was stowed by the loading stevedore, and not to the design of the stowage plan, and, therefore, on the authority of the decision in *Derr v. Kawasaki Kisen K.K., supra,* entered judgment for the respondent shipowner (6a, 7a).

## REASONS WHY THE WRIT SHOULD BE GRANTED

1. **The law in the Third Circuit relating to unsafe conditions existing in a cargo stow, as it has evolved since the decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), is currently the subject of a Writ of Certiorari granted by this Court in *Albert Howlett v. Birkdale Shipping Co., S.A.*, No. 93-670, ___ U.S. ___, 126 L Ed 2d 648 (January 10, 1994). The within case, which was decided on the basis of the decision in *Derr v. Kawasaki Kisen, K.K., supra,* should be governed by this Court's disposition of the Writ of Certiorari in *Albert Howlett v. Birkdale Shipping Co., S.A., supra.***

On January 10, 1994, this Court granted a Writ of Certiorari in the case of *Albert Howlett v. Birkdale Shipping Co., S.A.*, No. 93-670, ___ U.S. ___, 126 L Ed 2d 648, on the issue of whether the shipowner's duty of care owed to longshoremen extended to unsafe conditions existing in a cargo stow, the precise issue involved in the instant case. The *Howlett* case is scheduled for argument during the April term.

The instant case, which was one of the cases cited in the *Howlett* petition, is in direct conflict with the decision of the Fifth Circuit in *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842

(5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), and the decision of the Ninth Circuit in *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993). Both *Woods, supra,* and *Riggs, supra,* like the instant case, involved injuries to unloading longshoremen caused by dangerous conditions resulting from the manner in which steel pipe was loaded aboard a ship, and both, contrary to the Third Circuit's decision in *Derr v. Kawasaki Kisen, K.K., supra*, held that the vessel was liable for such conditions, even if the condition was "open and obvious."

The clear conflict between the instant decision, and the decisions in *Woods, supra,* and *Riggs, supra,* in an area of the law which Congress mandated be uniformly interpreted and applied throughout the country,[2] would warrant the granting of a writ of certiorari in the instant case independent of the fact that a writ of certiorari already has been granted in *Albert Howlett v. Birkdale Shipping Co., S.A., supra.* However, since it is believed that the issue in the instant case will be considered and resolved by this Court's disposition of the *Howlett* case, it is respectfully submitted that it would be appropriate to grant a writ of certiorari in this case, with the case to be remanded to the Third Circuit for disposition on the basis of this Court's decision in *Howlett, supra,* depending, of course, on how this Court decides *Howlett.*

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[2]See House Report No. 92-1441, 1972 U.S. Code Cong. and Adm. News, at page 4705:

"Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law."

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment below.

Respectfully submitted,

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# APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| FRANCIS SOMENSKI and JOHN WALSH | : | CIVIL ACTION |
| v. | : | |
| COMPANHIA DE NAVEGACIO LLOYD BRASILEIRO, ET AL. | : | NO. 90-2737 |

**MEMORANDUM**

Dalzell, J. April 30, 1992

Plaintiffs Francis Somenski and John Walsh filed this action against Companhia de Navegacio Lloyd Brasileiro ("CNLB"), owner of the M/V Lloyd Tupiara, seeking to recover for injuries plaintiffs sustained while unloading steel pipe from the ship at the Tioga Marine Terminal in Philadelphia.[1] Because CNLB is owned by the government of Brazil, it is an "agency or instrumentality of a foreign state" within the meaning of § 4(a) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a) and (b). This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1330(a).

Following a two-day non-jury trial on the issue of liability, we find that defendant is entitled to judgment in its favor and will therefore enter judgment accordingly.

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[1]Two additional defendants, Mannesmann Commercial S/A and Agencia Maritima Laurits Lachman S/A, were named in the Complaint. Agencia Maritima was never served with the complaint and Mannesmann was dismissed by stipulation on November 27, 1991. CNLB is therefore the only remaining defendant.

The parties have stipulated to the following facts. Plaintiffs Francis Somenski and John Walsh were injured on June 23, 1987 while unloading a cargo of steel pipe from the No. 5 lower hold of the Lloyd Tupiara. Somenski and Walsh were longshoremen working for the John Mulgrew longshore gang,[2] which was in turn working under the supervision and control of I.T.O. Corporation, an independent stevedoring contractor hired to discharge the ship's cargo. As noted, CNLB owns the Lloyd Tupiara.

The No. 5 lower hold contained high pressure steel pipe of varying diameters and lengths between twenty and twenty-four feet packaged into bundles of eitht to ten pipes which were banded and/or boxed into wooded crates. The pipe was packaged and loaded aboard the ship by an independent stevedore in Rio de Janeiro, Brazil. Aside from a relatively small quantity of pipe loaded across the forward end of the hold, the pipe was stacked in two piles which came to within five or six feet of the top of the hold. Plaintiffs contend that the pipe was improperly stowed for three reasons: (1) the two piles of pipe overlapped slightly at the center of the hold; (2) the pipe was stored to too great a height; and (3) there was insufficient chocking[3] between the bundles of pipe.

Plaintiffs were standing in the No. 5 lower hold when the accident occurred. In discharging two bundles of pipe, plaintiffs had just fastened two steel cables around the pipe, one at each end. As the pipe was being lifted out of the hold, one end apparently became caught on other cargo, causing the pipe to pivot around, with the opposite end striking plaintiff Walsh who, in turn, struck

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[2]A "gang" is a group of about ten longshoremen led by the "boss" whose name identifies it. Plaintiffs were two of the four "holdmen" in the gang assigned to work in the No. 5 lower hold. Holdmen work with gang colleagues on the ship's deck, known as "deckies," in the perilous task of loading and unloading cargo.

[3]Chocking, or dunnage, consists of pieces of wood, typically two-by-fours or four-by-fours, that separate bundles of cargo to aid in the unloading process.

plaintiff Somenski, causing him to fall perhaps seventeen feet to the bottom, or skin, of the ship.

Plaintiffs claim that the improper stowage of the cargo caused their injuries, and that CNLB should be held liable because the pipe was loaded on the ship in accordance with stowage plans designed by the ship's captain and chief mate. Plaintiffs make no claim that the ship's gear or equipment was faulty in any way.

II.

The Longshoremen's and Harbor Worker's Compensation Act provides that a longshoreman injured "by the negligence of a vessel . . . may bring an action against such vessel as a third party." 33 U.S.C. § 905(b). Under the 1972 amendments to the Act, however, the shipowner's duty is narrowly circumscribed. A shipowner has a duty to its stevedores and their longshoremen employees to exercise "due care 'under the circumstances.'" *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 166 (1981) (quoting *Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 415 (1969). While the shipowner can rely on an experienced stevedore "to use reasonable care to carry on its cargo operations with reasonable safety to persons and property", *Scindia*, at 167, the shipowner has an obligation to the stevedore to maintain the ship's gear and equipment in good condition and to warn the stevedore of any hazards known to the shipowner which are not known to the stevedore and would not be obvious to or anticipated by the experienced and competent stevedore. *Id.*

With respect to cargo operations, "the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards." *Id.* at 170. A shipowner has no independent duty to the longshoremen to inspect or supervise the stevedoring operation. *Id.* at 168. A limited exception exists, however, in that a shipowner may be liable if it "actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they

may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation." *Id.*

Plaintiffs here do not contend that the ship's equipment was maintained in a negligent condition, nor do they claim that CNLB knew (or should have known) of any hidden danger. Rather, they argue that the ship's captain and chief mate "actively involved" themselves in the cargo operations by designing the stowage plan the stevedore in Brazil implemented.

Given plaintiff's claim, it is important to know precisely what a stowage plan in. The plan is typically a sheet the size of an architect's working drawing or an engineer's blueprint. It schematically depicts in rectilinear forms the hold areas and levels of the ship. Within these boxes are written in numbers and words the quantity and type of cargo to be stowed in the particular hold or level and its destination, *e.g.*, "Rio-Philadelphia (Mannesmann, 12 bundles, steel tubes, 23.1 tons." Most notably, the stowage plan says nothing about the stacking, locating, or securing of the cargo, issues that are left to the expertise of the stevedore.[4]

We find that the limited actions that ship's officers took in formulating the stowage plan for this voyage were insufficient, as a matter of law, to constitute the type of "active involvement" the Supreme Court contemplated in *Scindia*. It is undisputed that a ship's officers must always approve cargo stowage plans (regardless of who designed the plans) because the ship's officers are ultimately responsible for a safe voyage. Clearly, the senior officers of the ship must know what cargo is on their ship and where it is stored in order to transport the cargo intact. While it appears that the Lloyd Tupiara's officers took an extra step here, that of creating the stowage plans rather than simply approving them, this is not sufficient to impose liability on the shipowner under *Scindia* because to do so would negate the shipowner's ability to rely upon the

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[4]The stowage plan at issue here is Joint Exhibit 8.

expertise of the stevedore to avoid accidents during cargo loading and unloading.

We further note, based upon the undisputed testimony of both experts at trial, that regardless of the cargo stowage plans given to a stevedore, if the stevedore, in his experience, finds that the planned stowage would pose an undue risk of harm to his longshoremen, the stevedore will refuse to perform the requested work unless an alternative can be developed that will enable the stevedore to carry on the cargo operations with reasonable safety.[5] There is no evidence that either the loading stevedore or the discharging stevedore ever expressed any hesitation over the stowage plan.

According to plaintiffs, there were three problems with the cargo stowage: (1) the pipe was stored too high; (2) the two piles of pipe were overlapping; and (3) there was insufficient chocking between the bundles of pipe. The first two factors were readily apparent to anyone (including the unloading stevedore) opening the hatch and looking into the hold, yet no one ever expressed any concern to the ship's officers or crew about their ability to discharge the cargo safely. Further, even if we were to assume that the insufficient chocking and overlapping of the two piles made discharge of the cargo unreasonably dangerous, there was no testimony that either of these conditions was the result of the stowage plans the ship's officers developed. Indeed, even plaintiff's expert, Captain Mistry, acknowledged that there was sufficient room in the hold to store two totally separate piles of pipe, and that if the two piles had been separated, "of course" they could have been discharged safely.

In sum, we conclude that the preparation of the stowage plans here do not constitute the "active involvement" *Scindia* requires for

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[5]The testimony on this point is that the hatch is opened at the destination port to the view of a senior representative of the stevedore before any longshoreman sets foot on the ship. If the supervisor regards the cargo as presenting "a problem" or a safety hazard, no work is done until mutually satisfactory changes are made to assure the safe unloading of the cargo.

liability to be visited upon the ship. Even if w were to hold that the design of cargo stowage plans by the Lloyd Tupiara's officers constituted "active involvement" on the part of CNLB, however, we could not conclude, based on the evidence presented here, that CNLB failed to exercise reasonable care under the circumstances in developing those plans. As to the details of the chocking and positioning of the cargo in hold No. 5, nothing adduced before us differed from the premise of *Scindia* and the 1972 amendments to the Longshoremen's Act "that stevedores are primarily responsible for the storage of cargo", *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), and therefore this ship cannot be legally responsible for the unfortunate accident that befell plaintiffs.

The foregoing constitutes this Court's findings of fact and conclusions of law under Fed.R.Civ.P. 52(a).

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| FRANCIS SOMENSKI and JOHN WALSH | : | CIVIL ACTION |
| v. | : | |
| COMPANHIA DE NAVEGACIO LLOYD BRASILEIRO, ET AL. | : | NO. 90-2737 |

**JUDGMENT ORDER**

AND NOW, this 30th day of April, 1992, for the reasons set forth in the foregoing Memorandum, JUDGMENT IS HEREBY ENTERED in favor of defendants and against plaintiffs.

BY THE COURT,

/S/ Stewart Dalzell, J.
Stewart Dalzell, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 92-1431

---

FRANCIS SOMENSKI and JOHN WALSH,
Appellants
V.
COMPANHIA DE NAVEGACIO LLOYD BRASILEIRO;
MANNESMANN COMMERCIAL S/A;
AGENCIA MARITIMA LUARITS LACHMANN S/A

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APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil Action Nos. 90-02737)
District Judge: Hon. Stewart Dalzell

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Argued February 23, 1993

Before: HUTCHINSON, NYGAARD and SEITZ,
Circuit Judges

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JUDGMENT ORDER

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After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

By the Court,

/S/ William D. Hutchinson
Circuit Judge

ATTEST:

/S/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: Oct. 14, 1993

**Excerpts from testimony of**
**Captain Wilton De Jesus Santos**

Q. Would you please state your full name?

A. Wilton De Jesus Santos

* * * * *

Q. Captain Santos, you testified earlier that the stowage plan, Exhibit No. D-6, was prepared by the chief officer, is that correct?

A. Yes.

Q. And after he prepared it you approved it?

A. Yes.

Q. Now, when that stowage plan is prepared, did you have information as to all the cargo that was to be loaded on the ship?

A. Yes. I received all this information from the agent. They send me a description of the cargo.

* * * * *

Q. How long was the pipe that was going into the No. 5 hold?

A. Six to eight meters, more or less.

Q. And how long was the No. 5 hold?

A. I am not completely sure, but I can estimate about 10 to 11 meters.

* * * * *

Q. Now, the cargo in the No. 5 hold was loaded to go to Houston and to Philadelphia?

A. Yes.

**Excerpts from testimony of**
**Captain Wilton De Jesus Santos**

Q. After the Houston cargo was loaded, the Philadelphia cargo was then lowered into the hold; correct?

A. Yes

* * * * *

Q. When the pipe would be lowered into the hold, how would it be pushed into the forward end or the after end?

A. When it was being lowered, the stevedores pushed it into position?

* * * * *

Q. Did you watch them doing that?

A. Yes.

Q. You personally saw them do it?

A. Yes. Whenever I went around the hold, I saw them.

* * * * *

Q. Captain, I show you a document marked Plaintiff's Exhibit No. 1, which are photostatic copies of two pictures. Do you see that document?

A. Yes.

Q. I will tell you that these pictures were taken in Philadelphia following the time the accident is claimed to have occurred.

To your recollection, does that show the appearance of the cargo in the hold at the time it was being discharged in Philadelphia?

A. I don't remember. I can't tell you right now the exact position of the cargo, if they had already unloaded some pipes.

**Excerpts from testimony of**
**Captain Wilton De Jesus Santos**

Q. Was that the way or similar to the way the cargo looked when it was being stowed in Rio?

A. Yes, similar, yes.

* * * * *

Q. When the No. 5 lower hold was opened in Philadelphia, did you see the cargo in hat hold at that time?

A. Yes, I did.

Q. Was the position and condition of the cargo in Philadelphia at the time the No. 5 hatch was opened, to the best of your knowledge, the same as it was in Rio when the hatch was closed?

A. They were the same because in Rio, when I saw when i walked by the cargo before the put the lids on, I saw it, and they looked the same as in Philadelphia.

**Excerpts from testimony of**
**Captain Kenneth Mistry**

Q. Captain, after the cargo was stowed against the sides, at least as you determined it was, and then they loaded the rest of the cargo in the center of the hatch by doing it in the forward and after ends by, according to the Captain's testimony, by dropping it in and pushing it manually back and forth.

A. Correct.

Q. And it was stowed to the height under the 'tween deck as shown in the photograph. Do you see that?

**Excerpts from testimony of**
**Captain Kenneth Mistry**

A. In the photograph and the Stowage Plan. It appears to be stowed very high.

Q. I ask you to assume those facts to be correct.

In your opinion, was that part of the stowage a safe and proper stowage?

A. I have an opinion.

Q. What is your opinion?

A. No. It is not.

Q. O.K. Why not?

A. It is not safe from the standpoint of handling the cargo for discharge point of view.

* * * * *

But it is not safe from the standpoint of people who are going to handle it for discharging.

* * * * *

Q. Captain, if the pipe had been stowed in one pile in the square of the hatch, in your opinion would that cargo have been safe for discharge?

A. It would have been safe for discharge, yes.

This is what happens when you select a compartment like No. 5.

Q. Would you explain what you mean by that?

A. Yes. See, No. 5 is not a good compartment for this kind of cargo.

**Excerpts from testimony of**
**Captain Kenneth Mistry**

THE COURT: Because?

THE WITNESS: Because this is a straight product they are trying to load, and is limited by the space and shape of the compartment.

This is a great compartment if you were loading --

THE COURT: Coffee beans?

THE WITNESS: Coffee beans or cargo that can be physically handled by a couple of individuals and you shove it in here, shove it in there; fill it up here; fill it up there.

The kind of cargo that has been assigned to this compartment, the Master and Mate must realize that complications are going to arise in one way or another as a result of the nature of the cargo.

You cannot bend this cargo. You cannot physically lift this cargo by some human beings. You cannot start pushing and dragging this cargo. You're limited.

* * * * *

THE COURT: So, the essence of your testimony, and maybe I am "putting words in your mouth," but I have to understand it.

The essence of your testimony is that the unsafe act or decision was the decision to put the pipe in Hold No. 5, period.

THE WITNESS: And allowing it to come up so high where it made discharge difficult.

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No. 93-1471

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANCIS SOMENSKI and JOHN WALSH,
*Petitioners,*

*v.*

COMPANHIA DE NAVEGACIO LLOYD BRASILEIRO,
*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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# SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANCIS SOMENSKI and JOHN WALSH,
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*v.*

COMPANHIA DE NAVEGACIO LLOYD BRASILEIRO,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### COUNTERSTATEMENT OF THE CASE

The Petition correctly states that petitioners Francis Somenski and John Walsh are longshoremen who were injured while assisting with the discharge of steel pipes from the No. 5 lower hold of the M/V LLOYD TUPIARA. The Petition also correctly indicates that the manner of discharge utilized by the discharging stevedore, petitioners' employer, caused a bundle of pipes to become "caught" on other cargo and, as a result, the bundle swung around and struck petitioner John Walsh who, in turn, struck petitioner Francis Somenski, causing him to fall off the pipes to the bottom of the hold. *See* Petition at pp. 4-5. The Petition, however, also contains numerous mischaracterizations regarding the testimony at the trial of this case.

First and foremost, the Petition is misleading to the extent it implies that the stowage plan prepared by the ship's officers determined the *manner* in which cargo was stowed aboard the vessel. This is not true. The stowage plan was simply a schematic which indicated the quantity and type of cargo to be placed in each hold. (4a). The Captain of a vessel is required to review the stowage plan for every voyage, no matter who prepares it, so he knows the location and weight of the cargo and can ensure the stability of the vessel. (4a). The stowage plan in this case said "nothing about the stacking, locating, or securing of the cargo." (4a). These matters were "left to the expertise of the [loading] stevedore." (4a). Therefore, the trial judge, acting as judge and factfinder, correctly determined that the preparation and/or review of a stowage plan was "not sufficient to impose liability on the shipowner . . . because to do so would negate the shipowner's ability to rely upon the expertise of the stevedore . . . during cargo loading and unloading." (4-5a).

In addition, the Petition is misleading to the extent it alleges that the Master of the M/V LLOYD TUPIARA, Captain Wilton DeJesus Santos, had actual knowledge of the alleged hazard. During the trial of this case, petitioners alleged that the cargo presented a hazard because: (1) the pipes were "stowed to too great a height" within the hold; (2) "the two piles of pipe overlapped;" and (3) there was "insufficient chocking between the bundles of pipe." *See* Petition at p. 4. It is true, as petitioners point out, that Captain Santos observed the height to which the pipes were stowed in the hold. However, the trial judge determined that this was not a viable theory of liability in this case, since the height of the pipes did not cause the accident. Rather, the cargo defect that caused the accident, if any, was the lack of a separation between the two piles of pipe. Petitioners' own expert, Captain Kenneth Mistry, admitted that if the piles of pipe had been separated " 'of course,' they could have been discharged safely." (5a).

Thus, based upon this testimony, the trial judge, acting as factfinder, determined that the height of the cargo was not a factor in causing the accident.

As for the overlapping condition of the pipes and the alleged lack of sufficient chocking, there was no evidence presented to support a finding that Captain Santos was aware of these conditions. In fact, Captain Santos testified that, as far as he knew, there was a "separation" between the two columns of pipe. (1b). In addition, there was no evidence presented to support a finding that Captain Santos knew how much chocking the loading stevedore used in stowing the cargo. Furthermore, there was no evidence presented to support a finding that Captain Santos was aware of any hazard involving the stowage of the pipes. Captain Santos testified that, as far as he was aware, the pipes were stowed in the customary manner (1b) and there were no prior problems when pipes were stowed in this manner. (1b). More importantly, as the district judge pointed out, the condition of the cargo was inspected by a "senior representative" of the discharging stevedore who would not allow work to begin if the cargo presented " 'a problem' or a safety hazard." (5a n.5).

Finally, the Petition is misleading to the extent it alleges that the choice of the No. 5 hold for stowing this cargo was somehow improper. As noted, during the trial of this case, petitioners' expert, Captain Mistry, acknowledged that there was sufficient room in the No. 5 hold to stow two totally separate stacks of pipe and, if the stacks had been separated, " 'of course' they could have been discharged safely." (5a). Therefore, according to petitioners' own expert, the selection of the No. 5 hold for stowing steel pipes was not a cause of the hazard. The hazard, if any, was created by the manner in which the cargo was stowed by the independent loading stevedore and/or the manner in which it was discharged by the independent discharging stevedore. In fact, as factfinder, the trial court specifically found that even if

preparation of the stowage plan constituted active involvement in the loading operation by the shipowner, there was no evidence that the vessel "failed to exercise reasonable care." (6a).

## REASONS WHY THE PETITION SHOULD BE DENIED

The Petition accurately states that this Court granted a Writ of Certiorari in the case of *Howlett v. Birkdale Shipping Co., S.A.,* No. 93-670, ___ U.S. ___, 114 S.Ct. 681 (1994), to resolve a conflict among several Circuit Courts of Appeals as to whether a shipowner has a duty to supervise the loading operation of an independent stevedore. Oral argument regarding the *Howlett* case was held on April 20, 1994. Petitioners assert that the holding in *Howlett* would effect the rulings of the district court and the Third Circuit Court of Appeals in this case. This is not true. The "duty" at issue in *Howlett* was not raised during the trial or the appeal of this case. It cannot, therefore, be raised for the first time in a Petition for Writ of Certiorari.

In *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981), this Court defined the duties owed by a vessel owner to a longshoreman. Those duties have been categorized as: (1) the "turnover duty" (which includes the corollary "duty to warn"); (2) the "duty to intervene"; and (3) the "active operations duty." In *Howlett,* the petitioner has sought to impose a duty upon shipowners to supervise the work of loading stevedores through an overly broad and unwarranted interpretation of the "turnover duty." In this case, however, petitioners never raised a theory of liability premised upon the "turnover duty." Instead, the case proceeded to trial, and an appeal was prosecuted, based solely upon an alleged breach of the "active operations" duty due to the vessel's preparation of the stowage plan. As the lower court pointed out in its Opinion, petitioners did not "contend that the ship's equipment was maintained in a negligent

condition, nor [did] they claim that CNLB [the shipowner] knew (or should have known) of any hidden danger." (4a). The duty at issue in *Howlett,* therefore, was never raised before the district court or the court of appeals.

This Court has repeatedly stated that an issue which was not raised or pressed before the district court or the court of appeals cannot be raised for the first time in a Petition for Writ of Certiorari. *See e.g., Delta Air Lines v. August,* 450 U.S. 346, 362 (1981); *Hoover v. Ronwin,* 466 U.S. 558, 574 n. 25 (1984); *Illinois v. Gates,* 462 U.S. 213, 222-23 (1983) (the fact that the trial court relied upon established precedent is irrelevant; petitioner must raise issue at trial and/or Court of Appeals level). In this case, Petitioners readily admit that they did not pursue a claim based upon a breach of the "turnover duty." *See* Petition at p. 5. Accordingly, the issue in *Howlett* is *not* an issue in this case; a theory of liability premised upon the "turnover duty" has been waived.

Furthermore, the *Howlett* case is distinguishable in another important respect. The petitioner in *Howlett* alleged that the dangerous condition in the stow (i.e. plastic on the deck) was hidden from view at the start of the discharge operation and was "unknown to the [petitioner] longshoreman and his stevedore employer." *See* Brief for Petitioner in *Howlett v. Birkdale Shipping Co., S.A.,* No. 93-670, at p. i ("Question Presented"). Therefore, using the alleged "hidden" nature of the hazard as support for his argument, the *Howlett* petitioner sought to impose liability upon the shipowner under the "turnover duty."[1] Thus, the duty proposed by the *Howlett* petitioner would be limited to hidden conditions

---

1. As the respondent-shipowner in *Howlett* pointed out to this Court, the district judge in that case determined that the condition was "open and obvious," i.e. if the stevedore and its employees used reasonable care to identify potential hazards before and during the discharge operation as required by law, the plastic on the deck would have been readily discoverable.

in the cargo stow. In this case, there is no dispute that the plaintiff-longshoremen and the stevedore-employer had actual knowledge of the overlapping condition of the pipes.[2] Therefore, the theory of liability proposed in *Howlett,* even if adopted, would not support a finding of shipowner liability in this case.

Finally, the issue in *Howlett* is whether a vessel owner has a duty to conduct inspections during the course of cargo operations to prevent the creation of hidden cargo defects for the safety of the longshoremen who will board the vessel in subsequent ports. As discussed, even if this duty were imposed, it would not support a finding of shipowner liability in this case. Furthermore, to impose liability upon vessel owners for such alleged cargo hazards would be contrary to the congressional intent underlying the 1972 Amendments to the Longshore & Harbor Worker's Compensation Act and the elimination of the doctrine of seaworthiness. *See* Brief of Respondent in *Howlett.* Under any theory, shipowner liability for cargo conditions, if any, should be limited to situations where the vessel has actual knowledge of a hazard and the condition would not be obvious to or anticipated by a reasonably competent stevedore. In this case, the condition at issue was open and obvious and was known to the stevedore-employer. Furthermore, there was no evidence presented to establish that the vessel had actual knowledge of any hazard.

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2. As noted, according to the testimony of petitioner's expert, Captain Mistry, the overlapping condition of the pipes was the cause of the accident.

## CONCLUSION

The conflict at issue in *Howlett v. Birkdale Shipping Co., S.A.*, No. 93-670, ____ U.S. ____, 114 S.Ct. 681 (1994) is not an issue in this case. Even if it were an issue, the issue was waived. More importantly, the decision of the lower court in this case was based upon the lower court's conclusion, as factfinder, that there was no evidence that the vessel was negligent. (6a). Since there are no other issues presented which are ripe for review, respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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# SUPPLEMENTAL APPENDIX

**Excerpt from Testimony of**
**Captain Wilton De Jesus Santos**

Q. Captain, do the ship's officers or crews supervise the loading operations by the stevdore?

A. No.

Q. Captain, do you believe it is dangerous to stow pipe under the 'tween deck in the manner depicted in Photograph Defense Exhibit 4?

* * *

A. No.

Q. Why is that, Captain?

A. Because I have done this for 14 years.

* * *

Q. In those 14 years, Captain, did the loading stevedore ever have an accident or problem while loading pipe and stowing the pipe under the 'tween deck?

* * *

A. No.

Q. In those 14 years, Captain, did the discharging stevedore ever have a problem or accident while discharging pipe from under the 'tween deck?

* * *

A. No.

* * *

Q. So that if you made two columns of pipe in the No. 5 hold, some of the pipe had to overlap the pipe at the other end, didn't it?

A. No, no. They were left with the most minimum separation so they would facilitate the unloading, the discharging.

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*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

## PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
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## PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Contrary to the assertion in respondent's Brief in Opposition, the issue of the shipowner's duty of care with respect to dangerous conditions existing in a cargo stow -- the issue which is before this Court in *Howlett v. Birkdale Shipping Co., S.A.*, No. 93-670 -- was both raised and passed upon by the court below in the instant case. Indeed, the Trial

Judge specifically addressed this issue by beginning his discussion of the law applicable to the case with the statement that a "shipowner has no independent duty to the longshoreman to inspect or supervise the stevedoring operation" (3a). This clearly was a statement of the Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490, (3d Cir. 1987), *cert. den'd.*, 496 U.S. 1007 (1988), which is the subject of the *Howlett* petition.

Because the Third Circuit's decision in *Derr*, *supra*, was binding on the Trial Judge in the court below, petitioner sought to establish that the facts of the case also brought the case within the shipowner's "active involvement" duty, a duty which was recognized by this Court in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981). However, this attempt to bring the case within the "active involvement" duty did not change the fact the *Derr* decision, and its holding that a shipowner is not responsible for dangerous conditions arising from the manner in which cargo is stowed by a loading stevedore, was considered and relied upon by the Trial Judge in deciding the case. For this reason, should this Court, in *Howlett*, *supra*, now determine, that a shipowner *is* responsible for dangerous conditions in a cargo stow of which the shipowner knows or has reason to know, then the basic premise on which the Trial Judge decided the instant case would be incorrect, and the decision below should then be set aside and reconsidered.

While the *Howlett* case differs from the instant case in that, in *Howlett*, there is a factual dispute as to whether the dangerous condition was "open and obvious," whereas, in the instant case, the dangerous condition of the cargo stow admittedly was "open and obvious," this does not mean that this Court's decision in *Howlett* will not be controlling in the instant case, for there is no conflict in circuits with respect to

the vessel's responsibility for "open and obvious" conditions. Rather, every court which has had occasion to directly address the issue, including the Third Circuit in non-cargo stow cases, *see Kirsch v. Plovidba*, 971 F.2d 1026, 1031 f.n. 7 (3rd Cir. 1992), has held that the fact that a dangerous condition may be "open and obvious" does not automatically exonerate a vessel from liability, *see Moore v. M.P. Howlett*, 704 F.2d 39, 42 (1983), *Harris v. Reederei*, 657 F.2d 53, 54-55 (4th Cir. 1981), *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 852, f.n. 13 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), *Martinez v. Korea Shipping Corp., Ltd.*, 903 F.2d 606, 610 (9th Cir. 1990), cited and followed in *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993). For this reason, the statement at page 6 of respondent's Brief in Opposition that, under the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act, a shipowner should not be held liable for "open and obvious" conditions clearly is incorrect and contrary to the great weight of authority.

Respondent's argument that the issue of the shipowner's duty with respect to unsafe conditions in a cargo stow was "waived" (Respondent's Brief in Opposition, at page 6), is patently incorrect. *Illinois v. Gates*, 462 U.S. 213 (1983), on which respondent relies, clearly is not applicable to the facts of this case. *Illinois v. Gates*, *supra*, stands for the proposition that, in considering a petition for a writ of certiorari to review a decision of a state court, this Court will not consider issues which were "not pressed or passed upon" by the state court. *Illinois v. Gates* sets forth three bases for this rule, none of which are applicable to the instant case.

The first basis was that an issue which was "not pressed or passed upon" in the state court might not have an adequate factual record on which this Court could base review, see 462 U.S. at 221. This certainly is not true in the instant case as

the evidence as to the stowage of the cargo and the Captain's knowledge of the manner of stowage (10a-12a) clearly presents an adequate factual basis for considering that issue in this case.

The second basis for the *Gates* decision was concern for the relationship between this Court and state courts in giving state courts an appropriate opportunity to pass upon a particular issue. That also is not present in the instant case which involves a petition for a writ of certiorari addressed to a federal court, not a state court. Moreover, the Third Circuit has had numerous opportunities to address its decision in the *Derr* case and has refused to alter it.

The third basis for the "not pressed or passed upon" rule of *Illinois v. Gates* was to make sure that state courts had an opportunity to consider a particular issue with reference to the principle that a state court might decide an issue as one of state law, rather than of federal law, an issue clearly not applicable here where the issue is solely one of the interpretation of the federal maritime law.

Even if the "not pressed or passed upon" rule of *Illinois v. Gates* were deemed to be applicable to a petition for a writ of certiorari addressed to a federal court, rather than to a state court, it clearly would not preclude consideration of the instant petition, for the court below clearly "passed upon" the *Howlett* issue in the instant case by premising its decision on the principle that a shipowner had no duty of care with respect to dangerous conditions in a cargo stow created by a loading stevedore (3a).

Finally, the instant case is factually identical with the decision of the Ninth Circuit in *Riggs v. Scindia Steam Navigation Co.*, 8 F.3rd 1442 (9th Cir. 1993), in which the

shipowner has filed a petition for a writ of certiorari which is presently pending, *see Scindia Steam Navigation Co. v. Riggs*, Docket No. 93-1293 (62 L.W. 3632). Both the instant case and *Riggs* involve dangerous conditions created by the manner in which steel pipe was loaded aboard a ship by a foreign loading stevedore, with the danger being such that, even though open and obvious, it could not be avoided by the unloading longshoremen. The Ninth Circuit, in *Riggs*, specifically addressed the issue of whether the fact that an alleged dangerous condition was "open and obvious" would preclude a longshoreman from maintaining an action for negligence, and held that it would not. The issue presented in the instant case thus is identical with the issue already pending before this Court in the *Riggs* petition, and, therefore, if the *Riggs* petition is denied, then the petition in the instant case should be granted and the decision below should be reversed.

## CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment below.

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